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Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

v.

GLEN THEATRE, INC. *et al.*; DARLENE MILLER, *et al.*; and CIVIL CITY OF SOUTH BEND, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC.

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STATEMENT OF THE CASE

The statement of the case in Petitioners' brief is in general fair and accurate. The purpose of this brief statement is simply to clarify that there are two different sets of respondents, as there were originally two different cases prior to consolidation in the district court after the first remand. The position of the respondents is not identical, either with respect to the record or to the arguments they have consistently raised. The critical difference consists of the videotaped dances which are attached to the Joint Appendix. These respondents made those tapes for the record. They illustrate the kind of dancing these respondents propose to offer their audiences. The other respondents rely upon a verbal characterization of the dancing they propose. We believe that these dances, as part of the record, speak for themselves. Our argument, therefore, is not that nude dancing is per se protected by the first amendment. In fact, in the concluding section of this brief, we indicate ways in which and circumstances under which the State might regulate nude dancing. What we have consistently sought is a determination that the Indiana statute is unconstitutional as applied to dances like those in the record. Section IIB of this brief argues what we think it means to be dances like the ones in the record.

SUMMARY OF ARGUMENT

Dancing before an audience, unlike social dancing for private pleasure, is a form of communication. It is not simply "conduct" like flag-burning which has acquired

extrinsic meaning. It is therefore protected by the first amendment in the way that music and other nonverbal arts are. In some contexts, including the dances in this record, simple nudity is essential to convey the meaning that the human body is not shameful. This is only in part a message of eroticism: it is also a message about human life and movement. Although the record does not contain an explicit analysis of the dancers' message, we believe this message can fairly be understood from the nature of dance, from the history of nudity in our culture, and from the videotapes themselves. These videotapes reveal dancing which is not explicitly sexual.

The purpose of the Indiana statute, as it has been interpreted by the state courts, is to attach the message of shame to nudity. This policy is not a regulation of time, place, or manner. It is an effort to impose a policy of modesty so as to prevent the dancers' message of movement and naturalness from being expressed. The State's interests in regulating non-communicative aspects of nude dancing can be furthered by various regulations which do not require a total prohibition on nude dancing outside the ballet. The State concedes that "ballet" is constitutionally protected but defining that term would prove more difficult than defining obscenity has been. In any event, the State retains the power to punish obscenity and to regulate nudity in bars (if the legislature chooses to exercise it).

ARGUMENT

I. LIVE DANCING BEFORE AN AUDIENCE IS A THEATRICAL PERFORMANCE PROTECTED BY THE FIRST AMENDMENT.

This Court has long recognized that the rights secured by the first amendment "are not confined to verbal expression." *Brown v. Louisiana*, 383 U.S. 131, 141 (1966). This principle was applied to the wearing of military uniforms during an amateur skit in *Schacht v. United States*, 398 U.S. 64 (1970). Two terms ago, this Court applied the principle to music, which "as a form of expression and communication, is protected under the First Amendment." *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989). This Court has not yet directly held that dancing before an audience is a form of expression protected by the first amendment. The majority opinion in the Court of Appeals canvasses a number of sources, ranging from the Book of Psalms, which recognizes the use of dance to communicate praise (*Psalms* 149:3), to the New Encyclopedia Britannica, which details the history and theory of dance as an expressive art.[1] Several cases have referred to nude dancing particularly, observing that "this form of entertainment might be entitled to First

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[1] As the Encyclopedia Britannica points out, "ballroom dancing" is a different sort of activity, performed by "couples dancing prescribed steps for their own pleasure. . . . " 16 ENCY. BRIT. 990. This Court has accordingly recognized that dancing for private pleasure or association is not protected by the first amendment. *City of Dallas v. Stanglin*, 490 U.S. 19 (1989).

and Fourteenth Amendment protection in some circumstances," *Doran v. Salem Inn*, 422 U.S. 922, 932 (1974), and that "nude dancing is not without its First Amendment protections. . . . " *Schad v. Mount Ephraim*, 452 U.S. 61, 66 (1981).

Dancing is not just conduct which might from time-to-time have communicative or expressive qualities. Acts like setting fire to objects or camping out of doors are normal and commonplace acts whose purpose is usually to alter the physical environment toward some material end. When the item burned is a draft registration card or a flag, or when the camping is designated a protest and infused with meaning because of some extrinsic information or a communicative context, the conduct may have symbolic meaning. E.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *United States v. O'Brien*, 391 U.S. 367 (1968). The dance, however, is not a normal, utilitarian act whose purpose is only occasionally expression or communication. The dance is an established form of meaningful movement whose purpose is by nature communicative. "Dance may even have been the first means of communication."[2] In biblical times, the purpose

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[2] The Art of Dance, 16 NEW ENCYCLOPEDIA BRITANNICA 986 (1989). A subject so rich in literature and culture as the dance has created a vast library of secondary materials. For purposes of this brief, these respondents will limit their aesthetic and historical citations to the discussions in the Encyclopedia Britannica. We wish to assure the court that we have not simply wandered through a large bibliography, seizing marginal views isolated from the artistic or historical mainstream, and stuffing them into our brief to provide the illusion of intellectual authenticity. To provide that assurance, it seems appropriate to limit our cultural references to the unexciting but unmistakably mainstream summaries of the current Britannica.

of dance was "communication between religious leaders and the people." *The Art of Dance*, 16 New Encyclopedia 986 (1989). The classical Greek theatre relied on dance to express beauty as well as grotesque or comical elements. *Id.* at 987. The movements of dance have long been understood as a form of emotive expression. "Different combinations of steps can express different emotions." *Id.* at 988. "There are many things that can be said in dance, others that cannot be said." *Id.* at 989.

> The dancer communicates with the audience in two distinct ways, either through an outpouring of emotion through the body as well as the face or by a complex language of mime and gesture that can be fully understood only by spectators who know the "language." *Id.* at 989.

At a time roughly contemporary with the adoption of the first amendment, the leading work on dance described its expressive and communicative nature in the following phrase: "Dancing is possessed of all the advantages of a beautiful language." Jean-Georges Noverre, *Lettres sur la danse, et sur les ballets* (1760, trans. C.W Beaumont 1930), cited in 16 ENCY. BRIT. 991. In Twentieth Century America, there was a renewed emphasis on the idea of dance as a medium for the communication of subjective human experience. Illustrative of this modern aesthetic would be the work of Mary Wigman who left Germany because of the political suppressions of the Nazis and came to work in the United States, 16 ENCY. BRIT. 1004. As she wrote: "Beyond the personal interpretation underlying the dancer's gesture, there is always the responsibility and obligation to make clear the universal, super-personal meaning. . . . " Mary Wigman, *The Language of Dance* (trans. Walter Sorell, 1966), cited in 16 ENCY. BRIT. 1001.

The State of Indiana apparently recognizes that "*some* dance is communicative." It argues, however, that the dancing of this respondent, Darlene Miller, is not communicative for three reasons. First, the State argues, Ms. Miller candidly acknowledged that her motivation is to earn a living, to "make more money." Brief for Petitioners, p. 16. The State apparently believes that an intent to communicate and an intent to earn money are mutually exclusive. Dr. Johnson observed that any man who writes but not for money is a "blockhead": Darlene Miller doesn't dance for free either. Shakespeare wrote professionally too, and no doubt the publishers of the New York Times bear their fiduciary responsibility to their shareholders in mind. In *Burstyn v. Wilson*, this Court observed:

> That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures. 343 U.S. 495, 502 (1952).

And we fail to see why the operation for profit should have any different effect in the case of dance.

Second, the State of Indiana argues, there is no "particularized message" in Ms. Miller's dancing. The State believes that this proposition is evident upon a "review" of the video tapes in the Joint Appendix. Brief for Petitioners, p. 19. The State also argues that there is no message because Ms. Miller testified that she is "just entertaining, just dancing." The State dismisses the theory relied on by the Court of Appeals, that the message is an affective or emotional one. These arguments, like

Judge Easterbrook's dissenting opinion below, seem to be predicated on the principle that "politics are the heart of the First Amendment," Petitioners' Appendix, p. 79. If first amendment protection were limited to the business of discussing governmental affairs, as some have argued it should be, Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971), the State's argument here would be compelling. So also, as Judge Easterbrook argues in dissent, if non-political speech like music is protected only because it appeals to "rational human thought," Petitioners' Appendix, p. 89, the State's argument would be compelling. We believe this Court has clearly set the first amendment on a different course from that urged by the State and by Judge Easterbrook. In *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989), this Court specifically rejected the argument that the constitutional protection of music was only because of its intellectual appeal: "rulers have known its capacity to appeal to the intellect *and to the emotions* (emphasis supplied)." Similarly, in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981), this Court specifically held that "entertainment" is protected by the first amendment. Furthermore, accepting the theory that the first amendment protects only rational, as opposed to emotional, thought would, as Judge Posner observes in his concurring opinion below, "thrust outside the amendment's boundaries virtually all nonverbal art – except the relatively small portion that is didactic – and much literature as well." Petitioners' Appendix, p. 24. Central to the conception of art, poetry, music, dance is its power to engage our emotional as well as our rational selves. As Santayana

wrote, beauty is a value which springs "from the immediate and inexplicable reaction of vital impulse, and from the irrational part of our nature." George Santayana, *The Sense of Beauty* 24 (P. Rice ed., 1955)

Third, the State argues that the dancing in this case lacks "an artistic message." This conclusion is apparently justified because there is no choreography "carefully planned and executed to tell a story or communicate artistically." Brief for Petitioners, p. 12. The State, apparently rejecting the artistic validity of improvisation, characterizes nonchoreographed dancing as "aimless wandering." It may well be that the dancing in this case is not good art. It may be that the dancers are not highly skilled and that the impression they create is not one of grace and skill. But their lack of skill is not a lack of communication. The State has, in effect, created two kinds of messages protected by the first amendment: any "particularized idea" and emotions which are skillfully portrayed – although the state also objected that Ms. Miller danced for money rather than as an unpaid amateur. There are two problems with this theory. First of all, what Justice Holmes said of painting is also true of the dance: "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). Second, the question of skill or artistic accomplishment has no logical connection with the issue of whether art is communication. A badly written poem, a poorly performed play, an awkward drawing, are still efforts to communicate – just

as a poorly reasoned syllogism is an effort to communicate. This Court has of course said that artistic merit is relevant in determining what is obscene. That determination is not necessary, or even rationally related, to deciding whether obscenity is communication.

We believe the State may mean to argue that nude dancing can be regulated for other reasons: we don't know how else to understand its argument that the dancing *in this case* lacks communicative value because Judge Posner, in a dictum in a different case, once called topless dancing "artless." Petitioners' Brief, p. 25.[3] Accordingly, the next section of this brief discusses the meaning of nudity.

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[3] Here is what Judge Posner said in that case, obviously a play on the meaning of the word "art":

> Art, even of the questionable sort represented by erotic photographs in "provocative magazines – even of the artless sort represented by "topless" dancing – today enjoys extensive protection in the name of the First Amendment.

Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1141 (7th Cir. 1985), cert. denied, 475 U.S. 1094 (1986).

II. THE NUDITY OF THESE DANCERS IS NOT SIMPLY A "MANNER" OF SPEECH: THEIR NUDITY IS A DRAMATIZATION THAT SENSUALITY IS NOT SHAMEFUL.

The core of the State's argument is this:

> It is difficult to imagine a more "incidental" or limited restriction on public nudity than the requirement of "pasties" and a "g-string."[4]

The core of our argument is that nudity has a meaning in our society quite different from the meaning of the State's sanctioned costume for erotic dancing. Our argument rests on two independent propositions.

A. The underlying interests claimed for the Indiana statute are not furthered by requiring pasties and a g-string. The State argues that there are three purposes to the requirement of what it calls public decency: "valid concerns relating to family structure, attitudes toward women, and crime." Petitioners' Brief, p. 40. The State admits that the legislature has not itself articulated these interests but asserts that they can be derived either from "legislative concerns that 'should be self-evident to an educated man or woman' " (Petitioners' Brief, p. 31, quoting Judge Coffey's dissent in the court below) or from the history of the crime at common law, Petitioners' Brief, p. 28. The one thing that does seem to be clear about the common-law offense is that it did not require women to

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[4] We will use the term "g-string" because the State does in its brief. Whether such a device would actually satisfy the Indiana statute is a question of design and construction which is not, we think, relevant to the constitutional issue. *But see,* Erhardt v. State, 468 N.E.2d 224 (Ind. 1984).

wear pasties in public. *King v. Gallard,* 25 Engl. Repr. 547 (W. Kel. 162, 1733), involved an indictment "for running in the common Way naked down to the Waist, the Defendant being a Woman." The Court held that "The Indictment must be quashed, for nothing appears immodest or unlawful." It would indeed be truly astonishing to discover that the common law had "politically correct" feminist sensibilities toward the degradation of women, given the shameful restrictions it imposed on their legal rights in all other matters concerning family life. It is also difficult to see how such a hypothetical purpose could underlie the actual Indiana statute at issue in this case, since the statute prohibits both male and female nudity and the showing of "covered male genitals in a discernibly turgid state." Ind. Code Sec. 35-45-4-1. More fundamentally, whatever the considerable social consequences of exhibiting women in displays implying sexual availability, it is difficult to believe that the dignity of women is advanced by the State's approved dance costume of pasties and a g-string.

The State's other asserted interests, protecting the family and preventing crime, are notable for the lack of any evidence to support the link between mere nudity and family breakdown. These respondents do not argue that the Indiana legislature is required to base *its* judgments on plausible evidence. But these asserted interests have never been articulated, or even hinted at, by the Indiana legislature: in the following subsection of this brief, we argue that the actual reason for the Indiana law is the promotion of a particular position about the relationship between the human body and shame. In any event, since the Indiana legislature has, as the State

admits here, not articulated the crime-prevention and family-saving rationales itself, we do not owe it the same duty of accepting a proposition to be true because it *might* be so. As a matter of substance, the State's argument here asks us to accept as reasonable the proposition that adults may gather at revels where only pasties and g-strings are worn, although videotapes and films of full nudity will also be shown: so long as the pasties remain, husbands and wives will be faithful to each other and concerned for their children. The family will be intact and crime will be under control. But the State asks us to believe that removing one more item of clothing from this erotic gathering will affect family life in a significant way. This seems inherently implausible and there is no reason either to believe it or to believe that the Indiana legislature believes it to be true.

If the prevention of adultery or other anti-family crimes were the purpose of the law, nudity in private places would be a matter of at least equal concern. For example, in *Lasko v. State*, 409 N.E.2d 1124 (Ind. Ct. App. 1980), the defendant was a masseuse who was paid ten dollars to remove her clothes while massaging a man. If the statute were concerned with nudity as a danger to family values, this situation is the one fraught with peril. The Indiana Court of Appeals found that the statute did not apply because the room was not open to "witness." That court, discussing Indiana law, specifically held that the purpose of the statute was not to prohibit sexual misdeeds: "The legislative intent in prohibiting such conduct from occurring in a "public place" appears to be to compel persons who wish to engage in such conduct to do so *privately*." *Id.* at 1128 (emphasis in original).

There is certainly an important debate about the social and psychological effects of pornography on important values. There is some evidence that violent pornography causes crime and a serious dispute about the effects of non-violent depictions of sexual activity. None of this evidence, however, shows any link with nudity alone.[5]

B. In fact, the actual purpose of the Indiana statute, as applied in this case, is related to the suppression of expression. Its purpose is to restrain the image that sex is not shameful. In 1861, the Indiana Supreme Court found that the words "public indecency" did not validly define a criminal offense because "the acts which constitute it must vary with the different phases of society depending upon the fastidious, refined, or primitive views of the community in which they happen to be committed." *Jennings v. State*, 16 Ind. 335, 336 (1861). Sixteen years later, the Indiana Supreme Court held that it had the power to supply a definition of the term and did so by defining it as the exposure in a public place of private parts. The court's rationale for this interpretation remains the only authoritative statement of the purpose of the Indiana law. The court said:

> Immediately after the fall of Adam, there seems to have sprung up in his mind an idea that there was such a thing as decency and such a thing as indecency; that there was a distinction between them; and, since that time, the ideas of decency and indecency have been instinctive in,

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[5] The most recent general review of the empirical literature on pornography and harm is Donald Downs, *The New Politics of Pornography* 165-188 (1989).

> and, indeed, parts of, humanity. And it historically appears that the first most palpable piece of indecency in a human being was the public exposure of his or her, as now commonly called, privates; and the first exercise of mechanical ingenuity was in the manufacture of fig-leaf aprons by Adam and Eve, by which to conceal from the public gaze of each other their, now, but not then, called, privates. This example of covering their privates has been imitated by all mankind since that time, except, perhaps, by some of the lowest grades of savages.
>
> Modesty has ever existed as one of the most estimable and admirable of human virtues.

Ardery v. State, 56 Ind. 328, 329-30 (1877). The present Indiana statute is a linear descendant of the statute described in the *Ardery* case. In proposing the present language, the Indiana Criminal Law Study Commission said of the "nudity" provision involved in the present case that it, and the first two sections of the statute dealing with intercourse and deviate sexual conduct, "are just the restatement of the present law, only more specific in nature." *Indiana Penal Code, Proposed Final Draft* 127 (1974). Indeed, the current version of the statute is still interpreted with an eye toward the story of the Garden of Eden. In the *Lasko* case discussed above, the Court of Appeals observed that "Nudity and sexual activity have flourished in society since Adam and Eve. . . . " *Lasko v. State*, 409 Ind. 1124, 1128.

In short, no plain and simple statement of the purpose of the Indiana statute exists in any authoritative source. The language referring to the metaphor of the

Garden of Eden is not conventional legal analysis. Nonetheless, this story does have a deep and powerful meaning, a meaning which, as the State and Judge Coffey observed of their speculations, "should be self-evident to an educated man or woman." Petitioners' Brief, p. 31. This allegory closely fits the actual operation and interpretation of the Indiana statute and shows that statute to be based on a particular point of view about shame and acknowledgment of sensuality.[6] Prior to the Fall, Adam and Eve were unclothed because they were not ashamed. As Milton put it:

> Nor those mysterious parts were then concealed;
> Then was not guilty shame; dishonest shame
> Of Nature's works, honor dishonorable,
> Sin-bred, how have ye troubled all mankind
> With shows instead, mere shows of seeming pure. . . .

Paradise Lost, IV, 312-316. The key to the State's argument in this case is the contention that a dancer can portray an " 'erotic message' . . . just as effectively in scanty apparel

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[6] Northrop Frye's study of the meaning of biblical narratives devotes a chapter to the meaning of the story of the Garden as it appears throughout our culture. Northrop Frye, *Words with Power* 188-228 (1990). As he says of the phrase "naked and unashamed" from Genesis:

> The real issue involved here, however, is not one of simple prudery, but of the difference between a poetic and metaphorical structure, founded among other things on the primary concern of sex, and the transformation of this structure into a form of ideological authority.

Id. at 198.

as in total nudity." Petitioners' Brief, p. 40. What can not be conveyed just as effectively is the message that the dancer is not ashamed of what she is doing. The State's g-strings and pasties are signs of apology, "mere shows" of the view that carnal knowledge is forbidden. The fundamental error of the State's theory is in assuming that sensual messages are about sexual intercourse rather than about the sensual world. A fully clothed person can solicit sexual intercourse with words, with gestures. So can a performer wearing pasties and a g-string. The one thing that a dancer dressed in the State's costume cannot say is "I am not ashamed of my sensual nature." This is a powerful message and a legitimately controversial one. It is the expression of this message that the Indiana statute burdens.

Of course Ms. Miller did not articulate the message in these words when she said she was "Just entertaining, just dancing." Petitioners' Appendix, p. 133. She is a dancer, not a theorist. Many artists, even of the high-brow sort whose works hang in museums, cannot articulate their message in a different medium. Even in a verbal medium like poetry, as John Stuart Mill said, "Poetry is feeling confessing itself in moments of solitude, and embodying itself in symbols which are the nearest possible representations of the feeling in the exact shape in which it exists in the poet's mind."[7] The difficulty of

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[7] "Thoughts on Poetry and Its Varieties," in *The Six Great Humanistic Essays of John Stuart Mill* 3, 8 (1833). See generally, Cohen, "Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments," 66 *Ind L.J.* 175, 186-188 (1990).

reducing into particularized words the fluid meaning of a dance is even more daunting. As Isadora Duncan wrote: "My art is just an effort to express the truth of my Being in gesture and movement." Isadora Duncan, *My Life* (1927), cited in 16 ENCY. BRIT. 1002.

Ms. Miller may not have expressed herself as felicitously as did Ms. Duncan, but we believe the same sentiment is a fair reading of "Just dancing." The dances do speak for themselves and they are part of the record. The videotapes show dancing which is not aggressively sexual in its nature. The women who dance begin clothed and end nude. They do not display their genitals, make suggestive thrusting motions, touch or fondle their breasts or genitals, beckon sexually, or shimmy. They "just dance." Of course respondents do not wish to burden this Court with the task of reviewing dances throughout the country to determine whether the genitals are exposed to view (or some similar test of prurience). Our point is that these tapes, in this record, show a message which is not one of gross sexuality or debauchery. If that were the message, we believe the State of Indiana would be correct – gross sexuality can be communicated about as well with a little scanty clothing. Indeed, sequined ornaments might well heighten such a message by drawing attention to the forbidden, by alluding to the excitement of the shameful. What these tapes show is a natural and sensual dance, without any specific sexual content other than the inherent quality of a nude body in expressive movement to music. They are not great art, although they may be better than the inexpert taping by Mr. Asher (one of the counsel for respondents in this Court) reveals. They may not "tell a story," although

careful observation will reveal that the dancers are at times singing along with the recorded music and, in a technical or formal sense, conveying a particularized message. What they do express, or communicate, is an image that nudity, and by implication the sensual nature of the body in general and these bodies in particular, are not shameful. Clothing the dancer is not just a regulation of the time, place or manner of that message. It is a denial of it.

III. THE DISTINCTION THIS COURT HAS DRAWN BETWEEN OBSCENITY AND NUDITY IS A PRUDENT PRINCIPLE.

In every case presenting the issue, this Court has said that obscenity is not protected by the first amendment. Although the details of that definition have varied over the years, the core has been that obscenity depicts *sexual activity* of some kind in a way that lacks redeeming merit. At the same time, this Court has consistently recognized that mere nudity is not beyond the first amendment. *E.g.*, *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Jenkins v. Georgia*, 418 U.S. 153 (1974). In effect, the State of Indiana in this case is asking the Court to abandon that distinction. The State asks this Court to hold that nude theatrical appearances or nude dancing are unprotected unless they have artistic merit. The legal effect of this new doctrine would be to classify identically a person like this respondent, dancing nude without displaying any sexual behavior, and a couple copulating on stage. Both would be criminal unless they could satisfy the courts that they were "artists" rather than "entertainers." Abandoning the

distinction between nudity and obscenity would do violence to the lines drawn both in our culture and in the past decisions of this Court. It would create great burdens for all courts called upon to administer whatever new lines would emerge. It is also unnecessary since this Court has already recognized a wide range of state powers available for the control of whatever social hazards may arise from non-obscene dancing.

A. Distinguishing "Artistic" Nudity from "Entertaining" Nudity Would Prove To Be Very Difficult. The State concedes that something called "ballet" will be protected by the first amendment. Petitioners' Brief, p. 24. The State does not define "ballet," beyond the suggestion that it is choreographed. The State does not mention other forms of artistic dance, such as modern dance. Choreographing alone cannot be the distinction between "art" and "entertainment" unless the State seriously means to exclude improvisation, an important concept in the work of, for example, Merce Cunningham. 16 ENCY. BRIT. 1003. Likewise, traditional folk-dancing and other ethnic dances are not "choreographed." Perhaps the State believes that something called "ballet" never really involves nudity but avant-garde movements in the United States, Britain, Belgium and The Netherlands do use nudity in something which is usually called "ballet," 16 ENCY. BRIT. 1000.

The State suggests that the determination of artistic merit has become familiar in obscenity cases and that the same techniques could be employed in nudity cases. We submit that the process would be overwhelmingly different. Obscenity – the graphic portrayal of sexual activity in an explicit fashion – is only rarely consistent with

artistic themes. Nudity, on the other hand, has been associated with art in all visual media throughout our history. This is not an accidental link since art has often been concerned with the human body and nudity is a condition of that body.

To illustrate this point in a practical context, suppose the music on the jukebox had been Swan Lake or, perhaps more realistically, "I Feel Pretty" from West Side Story. Suppose the dancer's steps had been written out in advance. Suppose that instead of dancing about half the time clothed (as in these tapes) the dancers remain clothed for three quarters of the proceedings. Now would this be art? We do not believe that this problem would be insuperable for a Court that thought there was a great need to draw this line but we do not think anyone should underestimate the real-world difficulty of drawing these distinctions. The virtues of drawing these distinctions also seem elusive. The State concedes that nudity in "ballet," however exactly it is defined, will be allowed in Indiana. The result may well be no more than allowing men to admire nude women so long as they are not in a working-class context.

B. This State of Indiana Already Has the Power to Deal With the Possible Harms Associated With Nude Dancing. This Court has recognized that the states may deal with problems of indecent behavior in a variety of ways. Whatever validity there may be to the speculations by the Attorney General in his brief that the Indiana statute rests on particular social policies other than the expressive value of nudity in dancing before an audience, the State can reach these problems without a total ban on public nudity. There are at least four different ways in

which Indiana may protect itself from the concrete evils to which it points, all without abandoning the recognized constitutional distinction between obscenity and nudity.

(i) *The Twenty-First Amendment.* If Indiana chose to do so, it could adopt legislation regulating non-obscene but indecent entertainment in bars. *California v. LaRue*, 409 U.S. 109 (1972). Despite repeated references by the State to "barroom" dancing, the Indiana legislature has not bothered to regulate dancing in barrooms. The Indiana legislature has not made findings like those deferred to by this Court in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981). Whether the particular dancing of these respondents could be regulated under the twenty-first amendment is a question which has not been raised below and is not within the issues presented by the petition for certiorari. But in any event, the state legislature, if it were convinced by the Attorney General's arguments he makes here, would not need a general power over nude dancing to deal with barroom dancing.

(ii) *Regulation.* This court has repeatedly recognized that businesses concerned with sexual matters can be licensed and regulated by the states. These regulations can provide effective means of assuring that prostitution does not flourish, that neighborhoods are protected from possible degradation, and that minors and unconsenting adults are not involved. *E.g., Young v. American Mini-Theatres*, 427 U.S. 50 (1976); *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596 (1990). The one limitation on this principle is the very one the State seeks to circumscribe by its argument in this case. The power to regulate expression which

is sometimes harmful in some contexts is not a justification for banning it entirely. *E.g., Sable Communication v. Federal Communications Commission,* 109 S.Ct. 2829 (1989).

(iii) *Obscenity and lewdness.* An examination of the evidence submitted by these respondents in the videotape which is part of the Joint Appendix shows that these dances do not portray sexual behavior and do not involve display of the genitals. It is possible that some nude dancing might involve such activity and could be found obscene where the authorities trouble to develop the necessary record. *See, e.g., State v. Walters,* 440 So.2d 115 (La. Sup. Ct. 1983). This Court has recently upheld a statutory definition of "nudity" (involving children) as "lewd exhibition or involv[ing] a graphic focus on the genitals." *Osborne v. Ohio,* 110 S. Ct. 1691, 1698 (1990).

(iv) *Affront.* Even constitutionally protected speech can in some instances be restricted to assure that the autonomy of unwilling participants is not invaded. *E.g. FCC v. Pacifica Foundation,* 438 U.S. 726 (1978). The State's creative hypothetical cases, such as the nude park stroller or the rhythmic boom-box flasher, are easily dealt with under the recognized principle of preventing the intrusion of sexual imagery in contexts likely to give affront or in situations where nudity is not communicative.

Of course all these questions are matters for the legislature to address. The one thing we believe the legislature may not do is restrict the communication inherent in the dance by prohibiting nudity altogether or by restricting it to some undefined and prosecutorially administered category called "ballet." Within these limits,

this Court's prior decisions still empower the legislature to deal with the social problems nudity may create.

At the present time in Indiana, however, the situation is completely different. Both the Indiana Supreme Court and the Attorney General acknowledge that nudity is sometimes protected by the United States Constitution. Unfortunately, beyond undefined references to words like "ballet" and "context," no artist, promoter, entertainer or audience may know what is protected. Free expression in a constitutional democracy ought to be more than a question of what the authorities decide to tolerate.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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